Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. 77-1805

DEVERNON LEGRAND,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Preliminary Statement and Synopsis

The petitioner Devernon Legrand was indicted in the Supreme Court of the State of New York, Kings County, for the crime of Murder (two counts) in connection with the beating death of Ernestine Timmons. Following a trial by jury, he was convicted of one count of Murder by a judgment entered July 29, 1977, and was sentenced to a term of imprisonment of from twenty-five years to life. The Appellate Division of the Supreme Court of the State of New York, Second Department, unanimously affirmed this judgment of conviction in an opinion reported at AD2d , 402 N.Y.S.2d 209 (1977). On the 10th of April, 1978, leave to appeal to the Court of Appeals of the State of New York was denied by the Honorable Lawrence H.

Cooke, Associate Judge of the Court of Appeals. Copies of the opinions and orders of the New York appellate courts are set forth in the appendix submitted by petitioner. No opinion was written by the Supreme Court, Kings County.

Jurisdiction

The jurisdiction of this Court is invoked "under 28 U.S.C. § 1257(3)." (Petition, p.2). Petitioner claims, in substance, that it was error for the trial court to deny his request to charge the lesser included count of Manslaughter in the Second Degree, an offense the prosecution of which was barred by the applicable statute of limitations, even though petitioner expressly refused to waive any defense under the statute of limitations.

Question Presented

Whether the State courts' interpretation of §§ 30.10 and 300.50 of the New York State Criminal Procedure Law (CPL) is a proper subject for review by this Court, or whether this petition for a writ of *certiorari* should be denied for want of a substantial federal question and because the courts' construction of the state statute is a correct one.

Summary of the Facts

The evidence, as presented through the testimony of the numerous eyewitnesses to the beating, established the following:

On the evening of Friday, May 1, 1970, petitioner, who had been drinking heavily and who was yelling violently,

returned to his home at 222 Brooklyn Avenue and dragged his former wife, Ernestine Timmons, out of her bedroom. Miss Timmons was counting the money she had begged for petitioner on the streets of Brooklyn earlier that day. Angered because Miss Timmons had temporarily left him and returned to live with her mother, petitioner beat her repeatedly as she screamed for him to stop. He then threw her down a flight of stairs and continued to stomp her in the head and stomach. As the victim lay still on the stairway landing, while petitioner was still hitting her, blood was coming out of her nose and mouth.

The very next morning, Miss Timmons was found swollen, bloodied, toothless, and lifeless by her daughter, Vastiner, and by petitioner's current wife, Kathleen. The body, which was never found, was stored by petitioner in a basement freezer from Saturday until Monday, when he dismembered it, leaving a large pool of blood in the basement. Petitioner removed the body from the house in two garbage bags, dripping with blood, and drove to his farm in upstate New York.

Petitioner presented no testimony in response to the People's evidence, which included the eyewitness' accounts of the homicide and petitioner's own inculpatory statements before and after the killing.

Petitioner was acquitted by the jury of the intentional murder of Miss Timmons but was convicted of Murder for "recklessly" causing her death "under circumstances evincing a depraved indifference to human life." New York State Penal Law (PL) § 125.25(2).

The Statute of Limitations

Ernestine Timmons was murdered in 1970, and this prosecution was commenced with the filing of an indictment in 1976. Thus, prosecution for any offense other than murder is barred by CPL § 30.10. Because petitioner repeatedly and expressly refused to waive the five-year statute of limitations with respect to manslaughter, the court denied his request, pursuant to CPL § 300.50, to charge degrees of manslaughter as lesser included offenses of both counts of the indictment. The trial court thereby interpreted CPL § 300.50 to require the submission of only those lesser included offenses which may, themselves, be prosecuted under the statute of limitations. The Appellate Division of the Supreme Court, Second Department, agreed, concluding that "[u]nder the circumstances herein presented, a charge of manslaughter in the second degree as a lesser included crime would have been a useless gesture, since the only crime for which defendant could possibly have been found guilty was murder (*cf.* CPL § 300.50)." (Petition, p.5a).

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI.

The construction of CPL § 300.50 by the Courts below, which is in all respects reasonable and proper, is wholly a matter of state law and raises no substantial Federal question to be resolved by this Court.

This Court is permitted to review by writ of *certiorari* final judgments or decrees rendered by the highest court of a State where, *inter alia*, "the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States

. . . " 28 U.S.C. § 1257(3). In the absence of such a substantial federal question, and when the decisions of the courts below rest upon an adequate state ground, the matter does not "warrant the exercise of the *certiorari* jurisdiction of this Court." *Duncan* v. *Tennessee*, 405 U.S. 127 (1972).

Petitioner never contended, either at trial or in his appeal to the state courts, that the refusal of the trial court to submit the lesser included offenses of manslaughter denied him due process of law under the Fourteenth Amendment to the United States Constitution. Rather, he argued then, as he does now, simply that the courts' construction of CPL § 300.50 was an erroneous reading of *state* law, as determined by the Court of Appeals in *People* v. *Henderson*, 41 N.Y.2d 233 (1976). (Petition, p. 9). In response to this claim, the decisions of the Appellate Division of the Supreme Court, Second Department, and of Judge Cooke in denying leave for further appeal were based *solely* on the question of the proper interpretation of the state statute (Petition, p.5a).

This Court, of course, must follow the New York courts' construction of the state's Criminal Procedure Law. *Coleman* v. *Alabama*, 399 U.S. 1, 10 (1970). "[A] state's highest court is the final judicial arbiter of the meaning of state statutes . . . We give this finding great weight in determining the natural effects of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Gurley* v. *Rhoden*, 421 U.S. 200, 208 (1975). *See also, Hortonville Joint School District No. 1* v. *Hortonville Education Association*, 426 U.S. 482 (1976).

Thus, because of the failure of petitioner to raise any federal constitutional objection to the application of CPL

§ 300.50 in his case, either in the New York appellate courts or even in the instant petition (with the exception of one entirely unsupported and passing reference to the due process clause of the Fourteenth Amendment [Petition, p.3]), this Court is bound by the lower court's conclusion that the statute was correctly applied. *Tacon* v. *Arizona*, 410 U.S. 351 (1973); *Hill* v. *California*, 401 U.S. 797, 805 (1971); *Street* v. *New York*, 394 U.S. 576, 582 (1969); *Durley* v. *Mayo*, 351 U.S. 277, 281 (1955). A similar challenge to the law with respect to lesser included offenses in New York was dismissed with the conclusion that the "decision [of the New York courts] on such a state question is final here." *Paterno* v. *Lyons*, 334 U.S. 314, 319 (1948).

In short, *certiorari* should not be granted because "[s]o far as we have been made aware, this issue does not draw into question the [constitutional] validity of any [state] statute." *DeBacker* v. *Brainard*, 396 U.S. 28, 32 (1969).

One reason that petitioner may have foregone a challenge on due process grounds to the denial of his request for the submission of lesser included offenses is that such an argument is entirely without merit. Statutes of limitations are "*legislative assessments* of the relative interests of the state and the defendant in administering and receiving justice" (emphasis added). *United States* v. *Marion*, 404 U.S. 307, 322 (1971). They are designed by the Legislature "to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past." *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970).

Likewise, statutes allowing for the submission to the jury and conviction of lesser included offenses, such as CPL

§300.50, evolved from a common-law doctrine which empowered the jury "to extend mercy to an accused by finding a lesser degree of crime than is established by the evidence." *People* v. *Mussenden*, 308 N.Y. 558, 562 (1955). *See also*, *Kelly* v. *United States*, 370 F.2d 227, 229, (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967). As expressions of legislative intent, these statutes are subject to construction by the courts, and it was certainly reasonable and proper for the courts below to conclude that CPL §300.50 includes only those lesser included offenses which may be legally prosecuted, so that this section could not be used to avoid the applicable statute of limitations by permitting conviction of petitioner of a lesser included offense which could not be prosecuted by itself because such prosecution was untimely. *See*, *People* v. *DiPasquale*, 161 AD 196 (3d Dept. 1914).

It is significant that all of the jurisdictions that have considered this question have concluded that requests by defendants for the submission of time-barred lesser included offenses should be denied. *See*, *Chaifetz* v. *United States*, 228 F. 2d 133 (D.C. Cir. 1960), *rev'd on other grounds*, 366 U.S. 209, *reh. denied*, 306 U.S. 955 (1961); *People* v. *Vallerga*, 67 Cal. App. 3d 847, 882, 136 Cal. Reptr. 429, 449 (Ct. of App. 2d Dist. 1977); *Gurley* v. *State*, 348 N.E. 2d 16, 21 (S Ct. Ind. 1976); *Padie* v. *State*, 557 P.2d 1138 (S. Ct. Alaska 1976). In *Chaifetz*, the leading case, this Court declined to review a ruling by the United States Court of Appeals for the District of Columbia which interpreted Rule 31(c) of the Federal Rules of Criminal Procedure in the same manner as the lower courts have interpreted that rule's New York counterpart, CPL §300.50, in the instant case. The Circuit Court held that, regardless of which side requested that the lesser offense be charged, only those crimes which may be prosecuted according to the statute of limitations need be submitted to the jury:

> Quite clearly [F.R. Crim. Proc.31(c)] refers to offenses for which convictions might be had upon the

proof adduced. Otherwise it would run counter to all accepted rules as to what a trial judge should or can charge a jury concerning permissible verdicts.

Chaifetz v. *United States, supra,* at 136.

Rather than waive the five-year statute of limitations as he could have (*see, United States* v. *Wild,* 551 F.2d 418 [D.C. Cir.], *cert. denied,* 431 U.S. 916 [1977]; *People* v. *Kohut,* 30 NY2d 183, 190-191 [1972]), petitioner asked the court to allow the jury to convict him in violation of the statute. Surely, due process of law does not entitle petitioner to have the trial judge, the legal advisor to the jury, commit a fraud upon the jurors by advising them that they may convict petitioner of manslaughter without also informing them that such conviction is tantamount to an acquittal because it is barred by the statute of limitations. "[T]he trial court should not be required to instruct on the lesser offense which in effect does not exist." *People* v. *Vallerga, supra. See also, Chaifetz* v. *United States, supra.*

Petitioner deserves nothing more than that which he has already received, i.e., an interpretation of the CPL by the State courts. It was certainly legitimate for those courts to adopt the universally accepted approach and to interpret CPL §300.50 to require the submission of only those lesser included offenses of which conviction was *legally* permissible. This statute, as it has been construed, is "within the constitutional competence of the State Legislature, does not impinge upon any constitutional right of a defendant, and presents no federal constitutional issue." *United States ex rel. Russell* v. *LaVallee,* 322 F. Supp. 579, 581 (S.D.N.Y. (1971)) (wherein Judge Weinfeld rejected a similar attack upon the predecessor to CPL §300.50). Accordingly, the petition for a writ of *certiorari* should be denied. *Chaifetz* v. *United States, supra.*

CONCLUSION

The petition for a writ of certiorari should in all respects be denied.

Dated: Brooklyn, New York
July, 1978

Respectfully submitted,

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